No. 81-84

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BEN BUNDO, JR. and BEN BUNDO, SR.,

Appellants,

vs.

MICHIGAN LIQUOR CONTROL COMMISSION,

Appellee.

JURISDICTIONAL STATEMENT

APPEAL FROM THE SUPREME COURT OF MICHIGAN

RABETTE & O'DEA, P.C.
By: THOMAS P. RABETTE
Counsel of Record
Attorneys for Appellants Ben Bundo, Jr. and Ben Bundo, Sr.
1411 Woodward Avenue, Suite 200
Bloomfield Hills, Michigan 48013
313-333-7931

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

1. WHETHER A STATE REGULATION WHICH MAKES CONSTITUTIONALLY PROTECTED EXPRESSION, TO-WIT: NUDE DANCING ILLEGAL, IS UNCONSTITUTIONAL.

2. WHETHER THE STATE MUST SHOW A COMPELLING INTEREST TO JUSTIFY THE ABRIDGEMENT OF APPELLANTS' CONSTITUTIONAL RIGHT TO EXHIBIT NUDE DANCING.

3. WHETHER RULE 436.37 PROMULGATED BY THE MICHIGAN LIQUOR CONTROL COMMISSION VIOLATES EQUAL PROTECTION OF THE LAW BY DISCRIMINATING BETWEEN ESTABLISHMENTS WHICH SELL LIQUOR AND THOSE THAT DO NOT, AS TO THE ENTERTAINMENT WHICH MAY BE OFFERED.

4. WHETHER THE ACTIONS OF THE MICHIGAN LIQUOR CONTROL COMMISSION IN PENALIZING APPELLANTS BY REVOKING THEIR LIQUOR LICENSE FOR ONE VIOLATION OF RULE 436.37 WAS UNREASONABLE, ARBITRARY AND CAPRICIOUS THEREBY DENYING APPELLANTS DUE PROCESS OF LAW IN VIOLATION OF APPELLANTS' RIGHTS GUARANTEED THEM UNDER THE UNITED STATES CONSTITUTION.

5. WHETHER APPELLANTS HAVE BEEN DEPRIVED OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAW AS GUARANTEED THEM BY THE UNITED STATES CONSTITUTION BY THE MICHIGAN LIQUOR CONTROL COMMISSION'S ACTIONS IN PENALIZING APPELLANTS BY REVOKING THEIR LIQUOR LICENSE FOR ONE VIOLATION OF RULE 436.37, WHILE PENALIZING

II.

OTHER LIQUOR LICENSEES WITHIN THE STATE OF MICHIGAN FOR VIOLATION OF RULE 436.37 WITH SHORT TERM SUSPENSIONS OF THEIR LIQUOR LICENSES AND SMALL FINES.

PARTIES TO THE PROCEEDING

The caption of the case in this Honorable Court contains the names of all parties to the proceeding.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

BEN BUNDO, JR. and BEN BUNDO, SR.,
Appellants,

vs.

MICHIGAN LIQUOR CONTROL COMMISSION,
Appellee.

JURISDICTIONAL STATEMENT
APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

NOW COME Appellants, Ben Bundo, Jr., and Ben Bundo, Sr., by and through their attorneys, RABETTE & O'DEA, P.C. and presenting to this Honorable Court their Jurisdictional Statement as follows:

REFERENCE TO REPORTS OF OPINIONS BELOW

The Reports of all Opinions and Judgments delivered below are as follows:

1. Final Decision and Order of the Liquor Control Commission of the State of Michigan entered on August 15, 1978 — Decision and Order Unreported.

2. Opinion of the Circuit Court for the County of Ingham entered on February 5, 1979 – Opinion Unreported.

3. Judgment Affirming Decision of the Michigan Liquor Control Commission by the Circuit Court for the County of Ingham entered on February 20, 1979 – Judgment Unreported.

4. Memorandum Opinion of the Michigan Court of Appeals entered on April 9, 1980 – Opinion Unreported.

5. Order Denying Application for Leave to Appeal entered by the Michigan Supreme Court on April 15, 1981 – Order Unreported.

STATEMENT OF JURISDICTION

A. NATURE OF THE PROCEEDINGS.

In October of 1977, the Michigan Liquor Control Commissions' regulation 436.37, which banned bottomless dancing in licensed establishments, became effective thereby forbidding a form of entertainment Appellants had offered for at least three (3) years prior to October of 1977. In an effort to challenge the constitutionality of said regulations, Appellants did not cease offering bottomless dancing and were, accordingly, cited on November 29, 1977 for allowing three female dancers to dance nude in their place of business. This Violation resulted in a complaint being issued against Appellants on December 14, 1977 and, subsequently, a hearing was held on January 30, 1978 at which Appellants stipulated to a single violation of the new rule. Based on that hearing, the Michigan Liquor Control Commission, on February 8, 1978, issued an Opinion that declared the rules in question constitu-

tionally valid and, therefore, revoked Appellants' liquor license and fined Appellants Nine Hundred ($900.00) Dollars. Throughout all administrative proceedings and through the State court system, Appellants have challenged the constitutionality of Michigan Liquor Control Commission Rule 436.37 on both State and Federal constitutional grounds. In addition, Appellants challenged the constitutional validity on State and Federal constitutional grounds of the punishment meted out to Appellants for one violation of this rule, more specifically the permanent revocation of the Appellants' liquor license, on both equal protection and due process grounds.

The case was prosecuted through the State court system and the administrative decision finding rule 436.37 constitutionally valid and punishment in revoking Appellants' liquor license for one violation of this rule also constitutionally valid was upheld throughout each appellate proceeding. The Appellants have taken this Appeal from those findings.

B. DATE OF ENTRY OF JUDGMENT OR DECREE AND FILING DATE OF NOTICE OF APPEAL

1. Final Judgment of Michigan Liquor Control Commission – August 8, 1978

2. Final Judgment of Circuit Court for the County of Ingham – February 20, 1979

3. Final Opinion and Judgment of the Michigan Court of Appeals – April 9, 1980

4. Final Order of the Michigan Supreme Court Denying Appellants' Application for Leave to Appeal – April 15, 1981

Notice of Appeal to the Supreme Court of the United

States was filed in the Michigan Supreme Court on June 8, 1981 and in the Michigan Court of Appeals on June 15, 1981.

C. JURISDICTION

The Jurisdiction of this Honorable Court to review the instant case is invoked under 28 U.S.C. 1257 (2).

Cases sustaining jurisdiction in the case at bar include:

1. *Saltonstall* v. *Saltonstall,* Mass. 1928, 48 S Ct 225, 276 US 260, 72 L Ed 565; *Live Oak Water Users Assoc* v. *Railroad Commission of State of California,* Cal. 1926, 46 S Ct 149, 269 US 354, 70 L Ed 305 where it is stated that the Supreme Court of the United States has the jurisdiction to review by writ of error a Judgment of a State court upholding the validity of a state statute attacked on Federal constitutional grounds.

2. *Pacific Telephone and Telegraph Co.* v. *Public Utilities Commission of California,* Cal. 1979, 100 S Ct 1, — US —, 62 L Ed 2d —; *Ex Parte Williams,* Neb. 1928; 48 S Ct 523, 277 US 267, 72 L Ed 877; *Pennsylvania R. Co.* v. *Towers,* Md. 1917, 38 S Ct 2, 245 US 6, 6 L Ed 117, where direct appeals to the Supreme Court of the United States were allowed in order to challenge State regulations promulgated by State administrative agencies on Federal constitutional grounds.

In the event that this Honorable Court determines that this Appeal is improvidently taken for the reason that the proper mode of review is by Petition for Certiorari, Appellants request that this Appeal be regarded as and acted upon as a Petition for Writ of Certiorari pursuant to 28 USC 2103.

CONSTITUTIONAL PROVISIONS

The constitutional provisions, statutes, ordinances and regulations that the case involves are:

1. United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. United States Constitution, Amendment XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Michigan Administrative Code, Rule 436.37:

"(1) An on-premise licensee shall not suffer or allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals, as well as other types of nudity prohibited by statute or local ordinance.

(2) An on-premise licensee shall not suffer or allow in or upon the licensed premises the showing of films, television, slides, or other electronic reproduction depicting scenes wherein any person exposes to public view the pubic region, anus, or genitals, as well as other types of nudity prohibited by statute or local ordinance. This prohibition shall not apply to any publicly broadcast television transmission from a federally licensed station."

STATEMENT OF THE CASE

In Octotber of 1977, the Michigan Liquor Control Commission's regulation 436.37, which banned bottomless dancing in licensed establishments, became effective, thereby forbidding a form of entertainment Appellants had offered for at least three (3) years prior to October, 1977. In an effort to challenge the constitutionality of the regulations, the Appellants did not cease offering bottomless dancing and were, accordingly, cited on November 29, 1977 for allowing three female dancers to dance nude in their place of business. This violation resulted in a complaint being issued against the Appellants on December 14, 1977 and, subsequently, a hearing was held on January 30, 1978. At this stage of the proceeding, Appellants raised freedom of expression and equal protection challenges to Rule 436.37. Based on the hearing held on January 30, 1978, the Michigan Liquor Control Commission, on February 8, 1978, issued an opinion that declared the rules in question constitutionally valid and, therefore, revoked Appellants' liquor license and fined Appellants Nine Hundred ($900.00) Dollars. Subsequently, Appellants sought review of the aforementioned decision, which was had in front of the Hearings and Appeals Section of the Liquor Control Commission on August 8, 1978. At this review, Appellants again raised freedom of expression and equal protection challenges to Rule 436.37 and also raised equal protection and due process challenges to the punishment imposed upon Appellants for one violation of Rule 436.37. The Board issued its opinion on August 22, 1978, wherein it affirmed the Commission's earlier findings and ordered the Appellants' liquor license and liquor supplies be confiscated on September 25, 1978.

On September 21, 1978, the Appellants filed a Complaint for Writ of Superintending Control in the Circuit

Court for the County of Ingham, at which time the Liquor Control Commission stipulated to a Preliminary Restraining Order Pendente Lite. On February 20, 1978, the Honorable Robert Holmes Bell, Circuit Judge for the County of Ingham, denied Appellants' Application for a Writ of Superintending Control, holding that the findings of fact of the Liquor Control Commission were supported by competent, material and substantial evidence on the whole record, that the regulation in question was valid and constitutional and that Appellants' claims were without merit.

Following this denial, Appellants filed a Claim of Appeal, Petition for Order to Show Cause and Temporary Restraining Order with the Michigan Court of Appeals on March 12, 1979. On March 13, 1979, acting upon their decision of August 22, 1978, the Michigan Liquor Control Commission confiscated Appellants' liquor license and supplies. On March 29, 1979, the Michigan Court of Appeals issued an order restraining the Michigan Liquor Control Commission from enforcing their license revocation order and, in addition, restraining the Appellants from offering entertainment proscribed by the Michigan Liquor Control Commission Rule 436.37. On April 12, 1978, the Michigan Court of Appeals, on their own motion, revoked the order entered on March 29, 1979. In response to said Order, Appellants submitted a Petition for Re-hearing and a brief in support thereof. Despite the fact that this Petition was not opposed by the Michigan Liquor Control Commission, the Michigan Court of Appeals denied Appellants' application for re-hearing for lack of merit in the grounds presented.

On August 3, 1979, Appellants filed their brief on appeal in the Michigan Court of Appeals, raising the same constitutional challenges to both the rule and the punishment as were argued in the Court and administrative hearings

below. On April 9, 1980, the Michigan Court of Appeals affirmed the Ingham County Circuit Court's denial of the Writ of Superintending Control and the Michigan Liquor Control Commission's ruling that Appellants had violated Rule 436.37 (1) of the Michigan Liquor Control Commission, finding that the decision was supported by competent, material and substantial evidence on the whole record and that the constitutional arguments had already been decided in *Bundo* v. *Liquor Control Commission,* 92 Mich App 20 (1979).

On April 26, 1980, Appellants filed an Application for Leave to Appeal to the Michigan Supreme Court and on April 15, 1981, the Michigan Supreme Court denied Appellants' Application for Leave to Appeal.

The Appellants now take this Appeal to the United States Supreme Court from the above Judgments.

SUBSTANTIALITY OF QUESTIONS RAISED

It is the Appellants' position that the questions raised by this Appeal are of such a substantial nature as to require consideration by this Honorable Court. Initially, it is clear that Appellants, as the owners and operators of a certain business known as the Camelot Inn and as the holders of a State of Michigan liquor license giving Appellants the right to vend liquor, wine and beer, as well as other spirits, by the glass within the Camelot Inn, have substantial economic interest in this matter in that the Appellants' sole means of livelihood, that of operating the Camelot Inn, has been taken from them by the revocation of their liquor license for one violation of the Michigan Liquor Control Commission Rule 436.37. Appellants thus have suffered substantial irreparable harm in the loss of their established livelihood. Additionally, Appellants

would submit to this Honorable Court that Michigan Liquor Control Rule 436.37 is unconstitutional as violative of the United States Constitution and, further, that the penalty meted out to Appellants for one violation of the rule cannot withstand constitutional attack. Thus, Appellants would suggest that the constitutional issues involved in this case are extremely important, both in context of this case and in their own right, since the rule in question affects every holder of a liquor license within the State of Michigan. As a result, the constitutional issues presented by this Appeal are of extreme public importance and a resolution by the United States Supreme Court necessary in order to fully adjudicate and determine whether Rule 436.37 and the punishment meted out to Appellants for one violation of this rule are in accord with the United States Constitution.

Respectfully submitted,

RABETTE & O'DEA, P.C.

By: THOMAS P. RABETTE

Attorneys for Appellants
1411 Woodward Avenue, Suite 200
Bloomfield Hills, Michigan 48013
313-333-7931

APPENDIX

STATE OF MICHIGAN
DEPARTMENT OF COMMERCE
LIQUOR CONTROL COMMISSION

Resort "C"—SS D E F B A
Docket No. 23
Case No. 3

IN RE:

BENJAMIN BUNDO, JR.
BENJAMIN BUNDO, SR.
d/b/a Maple Lanes
1295 West Maple Road
Walled Lake, Michigan 48088

OPINION

(February 8, 1978)

Benjamin Bundo, Jr. and Benjamin Bundo, Sr., doing business as Maple Lanes (Maple Lanes) are the holders of a Resort Class "C" license issued by the Commission. On November 13, 1977 the Commission promulgated rules regulating entertainment which might be presented in licensed premises.

Maple Lanes is charged in a three-count complaint of allowing in the licensed premises entertainment in violation of Commission Rule R436.37 (1).

Rule R436-37 (1) states:

> "(1) An on-premise licensee shall not suffer or allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals, as well as other types of nudity prohibited by statute or local ordinance."

On November 29, 1977, Maple Lanes had three employees who exposed to the public their pubic region while on stage in the licensed premises.

Maple Lanes contends that the rule promulgated by the Commission is in fact unconstitutional per se. That the rule attempts to indicate that to expose certain regions of the human body is per se unlawful, without any definite standard, without reason, without showing that the public welfare is protected thereby.

The United States Constitution gives each state full authority over the importation and use of alcoholic liquor within its borders. U. S. Constitution, Art. 21 § 2.

The Michigan 1963 Constitution, Art. 4 § 40 provides that: "The legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof . . ." (Underlining supplied)

The Michigan Liquor Control Commission was created by the legislature in Act No. 8 of the Public Acts of 1933 (ex sess), as amended, (MCLA 436.1; MSA 18.971). The power to promulgate rules in regard to licensees and licensed premises is provided for in Section 7 of the enabling Act. See (MCLA 436.7; MSA 18.977)

Section 7 provides: "The Commission shall adopt rules

. . . governing the carrying out of this Act and the duties and responsibilities of licensees in the proper conduct and management of their licensed places . . ."

"Except as limited or defined by statute, the Constitution itself vests the statutory commission with plenary power to control alcoholic beverage traffic in this State . . ." *Terre Haute Brewing Co.* v. *Liquor Control Commission* 291 Mich 73 (1939)

In December 1972, the United States Supreme Court decided *California* v. *LaRue* 409 U S 109 (1972). In the opinion by Justice Rehnquist, expressing the view of six Justices, the Court upheld rules promulgated by the California Department of Alcoholic Beverage Control. The California rules are very similar to the rule in question. The Supreme Court indicated that the critical fact was that in *LaRue* the State had not prohibited these sexual acts in total, but only in places that are licensed to sell alcoholic liquor by the drink.

In *Wright* v. *Town of Huxley* 249 NW2d 672 (1977), the Court in an action for a declaratory judgment that a town ordinance was unconstitutional stated:

> "We add this caveat. Our decision does not apply to statutes or ordinances banning nudity in all public places. It is limited to the broad power of the state or municipality to regulate liquor traffic and to prohibit specific conduct on premises holding beer and wine licenses . . ."

The Supreme Court of Iowa upheld the validity of the following ordinance:

> "16.7 'NUDITY PROHIBITED. It shall be unlawful for any person holding a liquor control license or retail beer permit to allow or permit a public appearance on licensed premises by any person who is

nude or who exposes to public view his or her breasts, buttocks or genitals.' "

"16.8 'NUDE PERSON PROHIBITED. It shall be unlawful for any person to appear publicly on licensed premises who is nude or who exposes to public view his or her breasts, buttocks or genitals.' "

It should be noted that as in *LaRue,* the Licensee above challenged its (the ordinance) validity by a declaratory judgment action.

In 1972 the City of Detroit adopted an ordinance limiting the concentration of "adult" theaters. The ordinance specified that an adult theater may not be located within 1000 feet of any two other regulated uses or within 500 feet of a residential area. The ordinance defined "regulated use" to include ten different kinds of establishments in addition to adult theaters. The classification of "adult" was predicated on the character of the motion pictures shown. The language used in the ordinance described in specific anatomical terms the activities exhibited on the screen. For example, "Specified Sexual Activities" was in part defined as:

". . . 2. Acts of human masturbation, sexual intercourse or sodomy; . . ."

See *Young* v. *American Mini Theaters,* 427 U S 50 (1976). The Court in *Young* held that limitation on the place where adult films may be shown does not violate the Equal Protection Clause of the Fourteenth Amendment.

In *Felix* v. *Young* 536 F2d 1126 (1976) the United States Court of Appeals, Sixth Circuit stated on page 1136:

"We find that the Detroit ordinances regulating the location of Group "D" cabarets are constitutional on their face . . ."

"The ordinances were enacted pursuant to authority granted by the Twenty-first Amendment . . ."

While it is true that the above cases are not identical to the case at hand, there are in the cases cited enough similarities to dismiss Maple Lanes' contentions as ill-founded.

The Commissioner after consideration of the total record finds that the acts of employees Linda D. Esquina, Naomi R. Burgess and Kandy A. Bentley of exposing to the public view their pubic region while on stage in the licensed premises are violations of Commission Rule R436.-37 (1).

It is Ordered that the license be Revoked. Further, it is Ordered that the Licensees pay a fine of $300 on each count in the complaint.

MICHIGAN LIQUOR CONTROL COMMISSION
/s/ THOMAS A. VAN TIEM, SR., Commissioner

Dated: February 8, 1978
TAV:dc

Paul G. Valentino, Attorney at Law
2242 South Telegraph
Bloomfield Hills, Michigan 48013

STATE OF MICHIGAN
LIQUOR CONTROL COMMISSION

Date August 15, 1978

In re:

Benjamin Bundo, Jr.
Benjamin Bundo, Sr.
d/b/a Maple Lanes
1295 West Maple Road
Walled Lake, Mi. 48088

Resort "C"–SS, D E F B A

Date of Violation Hearing: January 30, 1978

Charge:

(1) Suffer or allow upon the licensed premises one Linda D. Esquina to expose to public view her pubic region, anus or genitals; (2) suffer or allow upon the licensed premises one Naomi R. Burgess to expose to public view her pubic region; (3) suffer or allow upon the licensed premises one Kandy A. Bentley to expose to public view her pubic region or genitals.

Decision on Violation Hearing: November 29, 1977

It is ordered that the license be revoked. Further, it is ordered that the licensee pay a fine of $300 on each count in the Complaint.

Date of Decision on Violation Hearing: February 8, 1978

Date of Appeal Hearing: August 8, 1978

Decision on Appeal Hearing:

The Appeal Board adopts the Findings of Fact of the Hearing Commissioner, and therefore, it is the order of the Commission that Commissioner Van Tiem's order of February 8, 1978, be affirmed.

/s/ STANLEY G. THAYER
Chairman

/s/ LOUIS G. JARBOE
Commissioner

/s/ JOSEPH L. WISNIEWSKI
Commissioner

This is to certify that the above is a true copy of the decision and order of the Liquor Control Commission in the above case as it appears in the Commission meeting of this date.

/s/ .....
Agent

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

No. 78-

IN RE:
BEN BUNDO, JR., and
BEN BUNDO, SR.,
Plaintiffs.

PAUL G. VALENTINO (P21698)
Attorney for Plaintiffs

ORDER TO SHOW CAUSE WHY WRIT OF SUPERINTENDING CONTROL SHOULD NOT ISSUE AND TEMPORARY RESTRAINING ORDER

(September 21, 1978)

At a session of said Court, held in the City of Lansing, County of Ingham, State of Michigan, on Sept. 21, A.D. 1978.

PRESENT: THE HONORABLE JAMES T. KALLMAN, CIRCUIT JUDGE

UPON READING AND FILING the Complaint for Writ of Superintending Control of Plaintiffs, and the Court being otherwise fully informed in the premises,

NOW, THEREFORE IT IS HEREBY ORDERED that the Defendant, LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN, shall appear before this

Court on the 25th day of September, A.D. 1978, at 9:30 o'clock in the fore noon, or as soon thereafter as counsel may be heard, to then and there show cause, if any it may have, why said Writ of Superintending Control should not enter.

IT IS FURTHER ORDERED that in the meantime, and pending the above-scheduled hearing, the Defendant, LIQUOR CONTROL COMMISSION FOR THE STATE OF MICHIGAN, its agents, servants and employees, and all persons acting in active concert with the Defendant or having knowledge of this Order be, and the same are, restrained and enjoined from collecting fines from Plaintiffs, from confiscating Plaintiffs' liquor license or from confiscating Plaintiffs' liquor supplies, or in any manner, either directly or indirectly, executing upon or enforcing the order of the LIQUOR CONTROL COMMISSION dated August 15, 1978.

IT IS FURTHER ORDERED that service of this Order upon the Defendant at least 1 days prior to the date set for hearing shall be deemed sufficient service.

/s/ JAMES T. KALLMAN
CIRCUIT JUDGE,
INGHAM COUNTY

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

No. 78-22245-AS

BEN BUNDO, JR., AND
BEN BUNDO, SR.,

Plaintiffs.

PRELIMINARY RESTRAINING ORDER PENDENTE LITE

(September 27, 1978)

At a session of said Court, held in the City Hall, in the City of Lansing, County of Ingham, State of Michigan, on September 27, 1978.

PRESENT: HONORABLE JAMES T. KALLMAN, CIRCUIT JUDGE

This matter having come before this Court on Plaintiffs' Complaint for Superintending Control and Injunctive Relief Pending Circuit Court review of Respondent's, Michigan Liquor Control Commission, Administrative Order revoking Plaintiffs' liquor license for violations of Rule 436.37, and the Court having heard arguments of counsel representing the respective parties, on a record made in this matter, and the parties having filed a stipulated agreement in this regard, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

(1) That Respondent, Michigan Liquor Control Commission, will certify its administrative records of its revocation order against Plaintiffs, and file it herein for judicial review pursuant to Section 20, 1933 PA 8.

(2) That pending this review, Respondent, Michigan Liquor Control Commission is restrained from enforcing its orders of license revocation against Plaintiffs under the facts and administrative record herein subject to review.

(3) That pending this review, Plaintiffs, their agents, clerks, servants, or employees, or persons acting in concert therewith, are hereby restrained from engaging in or offering any entertainment on the licensed premises as proscribed by Respondent's Administrative Rule 436.37.

JUDGE JAMES T. KALLMAN
Circuit Judge

APPROVED FOR ENTRY WITHOUT FORMAL NOTICE:

/s/ PAUL G. VALENTINO
Attorney for Plaintiffs

/s/ THOMAS J. GIACHINO
Attorney for Respondent
Michigan Liquor Control Commission

[CERTIFICATION OMITTED]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

File No. 78-22245-SZ

IN RE:
BEN BUNDO, JR., and
BEN BUNDO, SR.,

Plaintiffs,

OPINION

(February 5, 1979)

Plaintiffs', Ben Bundo, Jr. and Ben Bundo, Sr., are the owners of Maple Lanes in Walled Lake, Michigan. This establishment has held a C-SS Liquor License issued by the Michigan Liquor Control Commission since 1967.

The plaintiffs', in operating their licensed liquor establishment have provided topless and bottomless dancing for their patrons for more than three years prior to the beginning of this cause. On November 13, 1977 Liquor Control Commission Rule 436.37 (1) became effective. Rule 436.37 (1) states as follows:

> "(1) An on premise licensee shall not suffer or allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals, as well as other types of nudity prohibited by statute or local ordinance."

Shortly after this rule went into effect Wilford G. Hook, Chief of the Walled Lake Police Department, sent a

letter to Mr. Ben Bundo, Jr. advising him that the Police Department had knowledge of possible violations of Rule 436.37 (1), and that such violations should cease. On November 29, 1977 six Walled Lake police officers, and a member of the Oakland County Sheriff's Department, liquor division inspected the plaintiffs' premises to determine if Rule 436.37 (1) was being violated.

As a result of the November 29th inspection the Liquor Control Commission issued a three count complaint alleging that three female employees of Maple Lanes engaged in activity which violated Rule 436.37 (1). A hearing was held pursuant to that Complaint before a hearings officer of the Liquor Control Commission. The testimony of three police officers, who had participated in the inspection of Maple Lanes was received.

The Hearings Commissioner, after consideration of the total record, found that three female employees of Maple Lanes did expose to public view their pubic region while on stage in the licensed premises, in violation of Commission Rule 436.37 (1). An Order was entered revoking plaintiff's liquor license and assessing the licensee a fine of $300.00 on each count in the complaint. An appeal was taken on this ruling.

On August 8, 1978, a hearing was held before the Liquor Control Commission appeal board. That panel adopted the findings of fact of the Hearings Commissioner, and affirmed both the Order revoking plaintiffs' license and the fine.

Throughout the administrative process the plaintiffs have admitted the allegations contained in the Liquor Control Commission complaint. Plaintiffs have pursued their case based on the belief that Rule 436.37 (1) is invalid and unconstitutional. Shortly after the administrative process began, the plaintiffs filed a complaint for Declaratory

Judgment in the Oakland County Circuit Court, seeking a ruling on the constitutionality of Rule 436.37 (1). On June 12, 1978 the Honorable Richard D. Kuhn issued a Declaratory Judgment which found the rules in question constitutional on their face.

The case is now before this Court on appeal from the administrative tribunal pursuant to a Writ of Superintending Control. Plaintiff contends this regulation infringes on constitutionally protected expression, is preempted by state statute, denies equal protection of the law, is an invalid ex post facto law, is outside the scope of the Liquor Control Commissions delegated power, and finally, as being an unconstitutional delegation of legislative power.

II

Plaintiffs' claim is that nude dancing, if not obscene, is afforded first amendment protection and that Rule 436-37 (1) is an unconstitutional infringement upon protected expression which is justified only in limited cases where the State can show a compelling State interest. The Michigan Liquor Control Commission agrees that nudity per se may not be constitutionally obscene, but agrees that under the twenty-first amendment nudity can constitutionally be prohibited conduct in an establishment licensed to sell liquor. The Liquor Control Commission relies heavily upon the case of *California* v. *LaRue,* 409 US 109; 93 S Ct 390; 34 L Ed 342 (1972) to support it's argument.

In *LaRue* (supra) the United States Supreme Court addressed the constitutionality of regulations similar to the one presently before this Court. *LaRue* holds that under the twenty-first amendment the State may prohibit sexually oriented performances not otherwise obscene or illegal, in

licensed liquor establishments and unless it can be said that the determination made by the State as to which sexually oriented performances are proscribed is in fact irrational, it cannot be said that the regulation on its face violates the Federal Constitution.

The *LaRue* Court stated several reasons for applying the rationality standard. First, the broad sweep of the twenty-first amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. 409 US 109 at page 114. This provides a state wide latitude in regulating intoxicating liquor. Second, the twenty-first amendment gives the regulation an added presumption in favor of the validity of the State regulation in this area. Third, when there is a claimed conflict with constitutional rights, the conflict must be resolved in light of both constitutional provisions and in light of the interests that each provision preserves as applied in each case, 409 US 114, 115.

The State has a substantial interest in exerting control over the circumstances under which liquor is served. *Lewis* v. *Grand Rapids,* 356 Fed 276 (6th Cir 1966); *Fitzpatrick* v. *Liquor Commission,* 316 Mich 83; 25 NW 2d 118 (1946). Thus the standard of judicial review of such regulation is whether it bears a rational relationship to the state's interest in controlling the circumstances under which liquor is served. The Liquor Control Commission regulations in question here are not an irrational means of controlling the circumstance of liquor traffic. The holding in *LaRue* (supra) clearly indicates that a State regulatory agency controlling the sale of liquor is not limited to dealing with the problems such sales pose to the public health, safety and welfare, within the limits of U. S. Supreme Court decisions regarding obscenity or

within the limits prescribed for dealing with forms of communicative conduct, 409 US 109, 116.

III

Plaintiffs argue that the rules promulgated by the Michigan Liquor Control Commission prohibiting nude dancing in establishments licensed to serve liquor on the premises are unconstitutional for the reason that the Michigan obscenity statutes, MCLA 750, 342, et seq. have pre-empted the field. Plaintiff relies on the case of *People* v. *Llewellyn*, 401 Mich 314; 257 NW 2d 902 (1977) to support this argument.

Plaintiffs reliance on the *Llewellyn* case is based upon the flawed premise that the regulations in question attempt to define and control obscene conduct. The regulations specify certain forms of erotic conduct and prohibit this conduct from being exhibited on premises licensed by the Liquor Control Commission, they do not define obscenity.

The reason the Michigan Supreme Court found that the Michigan obscenity statutes prohibited municipal governments from also regulating obscenity was due to the need for a uniform definition of criminal obscenity offenses for purposes of protecting free speech. But as *LaRue* (supra) demonstrates, a State may regulate certain types of conduct when the sale of liquor is involved, even if there is a slight infringement on first amendment rights. When the conduct is not protected by the first amendment the reason for pre-emption does not exist and neither should the rule exist.

The regulations involved here have specifically defined the prohibited conduct and the regulation will not be subject to varying standards in different areas of the state, as would undoubtedly be the case if each municipal gov-

ernment were allowed to define obscenity. Rather the regulations will be uniformly enforced by a single administrative agency.

The Supreme Court expressly acknowledged in *Lewelyn* (supra) that there would be no conflict between the pre-empting statutes and regulations which deal with erotica not defined in terms of obscenity. Such regulations are clearly outside of the States present statutory scheme governing criminal obscenity. 401 Mich 314, 331 (1977), the present regulations fall into this category and are hence outside the pre-empted field.

IV

Plaintiff next argues that the Liquor Control Commission regulations violate the constitutional right to equal protection of the law by discriminating between establishment which sell liquor and those that do not, as to the type of entertainment that may be offered. Plaintiff reasserts that the type of expression involved here is a fundamental constitutional right which can be a basis for distinct treatment only upon a showing of a compelling state interest. In *LaRue* (supra) it was concluded that the broad powers of the state to regulate the sale of liquor, conferred by the twenty-first amendment, outweighed any slight first amendment interest in nude dancing, and that a state could ban such dancing as part of its liquor license program so long as the regulations bear a rational relationship to the states interest in controlling the circumstances under which liquor is served.

A classification is constitutionally drawn where the distinctions made are rationally related to a proper state purpose. Here the classification based on sale of liquor is constitutional, since the constitution itself recognizes potential classifications based on liquor trafficking in the

twenty-first amendment. The classification of people being regulated is liquor licensees, none of whom are permitted to display nude entertainment on their licensed premises within this constitutionally based class. There is no inequal treatment. As stated previously the regulations bear a rational relationship to a proper state purpose, the circumstances under which liquor is served.

V

Plaintiff additionally argues that the Legislature has constitutionally delegated its legislative power to the Michigan Liquor Control Commission, and that the Michigan Liquor Control Commission is totally without power to enact regulations prohibiting nude dancing.

Const. 1963, Art 4 Sec 40 provides in relevant part "The legislature may by law establish a liquor control commission which subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof." This constitutional article specifically allows the legislature to delegate complete control of the retail sale of liquor to the Liquor Control Commission. The Michigan Supreme Court has declared that pursuant to the constitutional mandate, the commission, absent specific legislative limitation, exercises plenary governmental powers over all aspects of the liquor business in Michigan. *Fitzpatrick* v. *Liquor Control Commission,* 316 Mich 83; 25 NW 2d 118 (1946); *Terre Haute Brewing Co.* v. *Liquor Control Commission,* 291 Mich 73; 288 NW 2d 339 (1939).

Plaintiffs' contention that there is an unconstitutional delegation of power and that the commission is without power to enact the questioned regulations is unfounded.

VI

Plaintiff finally argues that Rule 436.37 is invalid as an ex post facto law.

Black's Law Dictionary (Rev 4th Ed 1968) defines an ex post facto law as: "A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed."

No charge has been brought against this licensee for violations of Rule 436.37 that may have taken place before its effective date. From November 13, 1977 all licensees were on notice that specific conduct could not take place on their licensed premises. The charges against the plaintiffs are for acts committed on their licensed premises on November 29, 1977, over two weeks after the effective date of the rule.

Hence, the rule in question cannot be ex post facto or retrospective in nature since it does not operate on fact in existence prior to its effective date. *Grant* v. *City of Alpena,* 107 Mich 335; 65 NW 230 (1895); *City of East Detroit* v. *Vickery,* 69 Mich App 183, 244 NW 2d 404 (1976).

There can be no vested right in the omission to legislate upon a particular subject. *Stott* v. *Stott Realty Co.,* 288 Mich 35; 284 NW 635 (1939) plaintiffs claimed vested rights turn on no more than an expectation. The nude entertainment which they offer has never been approved, either expressly or impliedly, since until the institution of the regulations nude entertainment was not part of license renewal considerations. Until that time, the plaintiffs had only a unilateral expectation, resting on mere anticipation of continuance of the existing law. Such is not enough to constitute a vested right. The regulations have no retrospective effect on plaintiff's vested property rights,

but only regulate certain details of plaintiff's exercise of those rights.

VII

Wherefore, this Court declares that the findings of fact of the Liquor Control Commission are supported by, competent, material and substantial evidence on the whole record, the regulation in question is valid and constitutional, and plaintiffs' claims are without merit.

Counsel for the defendant will prepare an Order in conformity with this Court's Opinion for signature.

IT IS SO ORDERED:

/s/ ROBERT HOLMES BELL
Circuit Judge

Dated: February 5, 1979

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

File No. 78-22245-SZ

IN RE:
BEN BUNDO, JR., and
BEN BUNDO, SR.,

Plaintiffs,

JUDGMENT AFFIRMING DECISION OF THE MICHIGAN LIQUOR CONTROL COMMISSION

(February 20, 1979)

FRANK J. KELLEY
Attorney General

A. C. Stoddard
Assistant Attorney General

Richard I. Rubin
Assistant Attorney General

Attorneys for Michigan
Liquor Control Commission
2251 Dix Highway
Lincoln Park, Michigan 48146
(313) 383-4000

Paul G. Valentino
Attorney for Plaintiffs
2242 S. Telegraph Road
Bloomfield Hills, Michigan 48013

At a session of said Court held in the Court House, in the City of Mason, County of Ingham, State of Michigan, on February 20, 1979.

PRESENT: HONORABLE ROBERT HOLMES BELL
Circuit Judge

This matter having come on for hearing pursuant to proper notice, and briefs having been filed by the respective parties hereto, and argument of counsel having been heard, and the Court having reviewed a certified record filed herein, and the Court having determined that Rule 436.37 (1) of the administrative rules of the Michigan Liquor Control Commission is valid and constitutional and that the findings of fact of the Liquor Control Commission are supported by competent, material and substantial evidence on the record, and an opinion to that effect having been filed;

IT IS HEREBY ORDERED and ADJUDGED that the decision of the Michigan Liquor Control Commission be and the same is HEREBY AFFIRMED.

ROBERT HOLMES BELL
Circuit Judge

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the twenty-eighth day of March in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable S. Jerome Bronson, Presiding Judge
William R. Beasley, Walter P. Cynar, Judges

No. 44113
L.C. No. 78 22245 SZ

BEN BUNDO, JR. and BEN BUNDO, SR.,

Plaintiffs-Appellants,

v.

MICHIGAN LIQUOR CONTROL COMMISSION,

Defendant-Appellee.

(March 29, 1979)

In this cause, a motion for order to show cause and temporary restraining order, together with a motion for immediate consideration, are filed by plaintiffs-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the motion for a temporary restraining order be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the preliminary restraining order issued on September 27, 1978 in the Circuit Court for the County of Ingham shall continue in effect until the further order of this Court. GCR 1963, 820.1 (7).

Under the provisions of that order as continued by this Court, the Liquor Control Commission, its agents, servants, and employees and all other persons acting in active concert with it or having actual knowledge of the order, are restrained from enforcing its order of license revocation against plaintiffs-appellants, and the plaintiffs-appellants, their agents, clerks, servants, or employees, or persons acting in concert therewith, are restrained from engaging in or offering any entertainment in the licensed premises as proscribed by the Liquor Control Commission Administrative Rule 436.37.

[JURAT OMITTED]

(Received April 17, 1979)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the twelfth day of April in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable S. Jerome Bronson, Presiding Judge
William R. Beasley, Walter P. Cynar, Judges

Docket No. 44113
L.C. No. 78 22245 SZ

BEN BUNDO, JR. and BEN BUNDO, SR.,

Plaintiffs-Appellants,

v.

MICHIGAN LIQUOR CONTROL COMMISSION,

Defendant-Appellee.

(April 16, 1979)

In this cause plaintiffs' motion for temporary restraining order having been granted on March 28, 1979 "until the further order of this Court", and further consideration thereof having been had, and the Court being fully advised in the premises,

IT IS ORDERED that the preliminary restraining order heretofore granted on March 28, 1979, be, and the same is hereby VACATED, and the Liquor Control Commis-

sion, its agents, servants, and employees and all other persons acting in active concert with it are hereby freed of any restraint heretofore imposed preventing them from enforcing the order of license revocation against plaintiffs. *Magnum Import Co* v. *Coty*, 262 US 159; 43 S Ct 531; 67 L Ed 922 (1923); *West Coast Home Improvement Co* v. *Contractors' State License Board*, 68 Cal App 2d 1, 155 P2d 863, 866-867 (1945); *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 260 US 212; 43 S Ct 475; 67 L Ed 217 (1922); *Withrow* v. *Larkin*, 421 US 35, 46; 95 S Ct 1456; 43 L Ed 2d 712, 723 (1975).

[JURAT OMITTED]

(Received May 17, 1979)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the eleventh day of May in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable S. Jerome Bronson, Presiding Judge
William R. Beasley, Walter P. Cynar, Judges

No. 44113
L.C. No. 78-22245-SZ

BEN BUNDO, JR. and BEN BUNDO, SR.,
Plaintiffs-Appellants,

v.

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendant-Appellee.

(May 16, 1979)

In this cause, an application for rehearing and motion for immediate consideration thereof are filed by appellants, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the application for rehearing be, and the same is hereby, DENIED for lack of merit in the grounds presented.

[JURAT OMITTED]

STATE OF MICHIGAN
COURT OF APPEALS

No. 44113

BEN BUNDO, JR., and BEN BUNDO, SR.,

Plaintiffs-Appellants,

v.

MICHIGAN LIQUOR CONTROL COMMISSION,

Defendant-Appellee.

BEFORE: W. R. Beasley, P. J., and D. E. Holbrook, Jr. and Richard E. Robinson, JJ.

MEMORANDUM OPINION

(April 9, 1980)

Following a hearing held on January 30, 1978, the Liquor Control Commission decided that plaintiffs had violated the commission's Rule 436.37 (1) by permitting bottomless dancing on its premises. On February 5, 1979, this decision was upheld by the circuit court. Plaintiffs appeal as of right.

Our review of an agency decision is limited to determining whether the decision is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, sec. 28; MCL 24.306; MSA 3.560 (206).

We hold that the commission's decision is supported by competent, material, and substantial evidence.

Plaintiffs also argue that the commission's rules prohibiting nude dancing are unconstitutional. These arguments were decided adversely to plaintiff's position in *Bundo* v. *Liquor Control Commission,* — Mich App — (Docket Nos. 78-2272, 78-2744, rel'd 8/20/79).

Affirmed. Costs to defendant.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

(August 20, 1979)

BEN BUNDO, JR. and BEN BUNDO, SR.,
Plaintiffs-Appellants,
v. No. 78-2272

LIQUOR CONTROL COMMISSION
FOR THE STATE OF MICHIGAN,
Defendants-Appellees.

BEN BUNDO, JR. and BEN BUNDO, SR.,
Plaintiffs-Appellants,
v. No. 78-2744

OAKLAND COUNTY PROSECUTOR,
ASSISTANT OAKLAND COUNTY PROSECUTOR,
MICHIGAN STATE POLICE, and WALLED LAKE
POLICE DEPARTMENT, Jointly and Severally,
Defendants-Appellees.

BEFORE: Allen, P. J.; and T. M. Burns and Holbrook, JJ.

ALLEN, P. J.

Are rules of the Michigan Liquor Control Commission prohibiting topless and bottomless dancing valid, constitutional exercises of the state's police power or do they violate the First or Fourteenth Amendment of the United States Constitution? The trial courts held such rules valid and plaintiffs appeal of right.

Plaintiffs are the owners and operators of the Camelot Inn in the city of Walled Lake, Oakland County, Michigan, an establishment licensed to sell liquor by the glass by the Michigan Liquor Control Commission. On October 14, 1977, the Liquor Control Commission adopted rules and regulations prohibiting on-premise licensees from allowing nudity or performing explicit sexual activities on the premises. Rule 436.37 provides as follows:

> "R436.37. Nudity prohibited: applicability to electronic reproduction.
>
> "Rule 37. (1) An on-premise licensee shall not suffer or allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals, as well as other types of nudity prohibited by statute or local ordinance.
>
> " (2) An on-premise licensee shall not suffer or allow in or upon the licensed premises the showing of films, television, slides, or other electronic reproduction depicting scenes wherein any person exposes to public view the pubic region, anus, or genitals as well as other types of nudity prohibited by statute or local ordinance. This prohibition shall not apply to any publicly broadcast television transmission from a federally licensed station."

For more than two years prior to the adoption of rule 37. (1) plaintiffs had permitted topless and bottomless dancing on the premises. Subsequent to the adoption of the rules, nude dancing by female entertainers continued and, on December 14, 1977, a complaint was issued against plaintiffs alleging plaintiffs violated Rule 436.37 by permitting three female entertainers to dance in the altogether on the premises. Hearing on the complaint was scheduled for January 30, 1978, but on January 20, 1978, plaintiffs filed a complaint for declaratory judgment in the Circuit

Court for Oakland County, alleging that Rule 436.37 was unconstitutional, said action being docket #78-2272 above.

On May 24, 1978, while decision on the merits of the complaint for declaratory judgment was pending, a combined squad of officers from the Michigan State Police, the Walled Lake city police department, and the Oakland County prosecutor's office "raided" the Camelot Inn arresting all of the dancers present, the bar manager, the cashier and the parking lot attendant. Claiming harassment, plaintiffs petitioned the trial court for a restraining order enjoining the police authorities from attempting to enforce Rule 436.37 pending decision by the trial court. When that petition was denied on grounds that the respective law enforcement agencies were not agents of the defendant Liquor Control Commission, plaintiffs filed a separate complaint in the Circuit Court for Oakland County naming the various law enforcement agencies as defendants. That action is this Court's docket #78-2744.

On June 6, 1978, the Camelot Inn was again raided by the combined forces of the several police agencies and two female dancers were arrested. On June 12, 1978, the trial court issued a declaratory judgment in docket #78-2272, holding the challenged rule of the Liquor Control Commission to be on its face constitutionally valid. On June 13, 1978, the trial judge issued his final order denying a restraining order in docket #78-2744, for the reason that declaratotry judgment in the first case made the relief prayed for in the second action moot. Plaintiffs appealed both cases to this Court which ordered the cases consolidated.

Although plaintiffs raise seven issues on appeal we find there is basically but one issue, that issue being whether Rule 436.37 of the Liquor Control Commission is a valid, constitutional exercise of the police power of the State of

Michigan. Except for two issues of minor importance, the remaining issues are subdivisions of the charge of unconstitutionality and will fail if the rule is held constitutional.[1]

We reject the charge that the Michigan statutes on obscenity, MCL 750.343 *et seq.*; MSA 28.575(1) *et seq.*, have preempted the power of the Liquor Control Commission to issue regulations governing conduct in licensed establishments. The doctrine of preemption is different from and should not be confused with divestment. Preemption occurs where there is a conflict between the statutes or regulations of the state and federal government or where the state and a municipality each regulate the same activity. 2 Am Jur 2d, Administrative Law, §§ 211-218, pp. 39-47. Michigan's obscenity statutes concern the distribution of obscene films and printed material. Rule 436.37 focuses on conduct in liquor licensed establishments. We find the two activities so different from one another that we cannot conclude that, in the absence of clear statutory language to the contrary, the Legislature intended to *divest* the Liquor Control Commission from either its well-established constitutional powers to control alcoholic beverage traffic, *Black* v. *Liquor Control Commission*, 323 Mich 290; 35 NW2d 269 (1948), or from its broad power

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[1] Plaintiff claims the rules are unconstitutional because (1) the Michigan obscenity statutes preempt the field; (2) the rules violate the first amendment of the United States Constitution guarantee of freedom of expression; (3) the rules contravene the equal protection clause of the fourteenth amendment of the United States Constitution by discriminating between those which sell liquor and those which do not; (4) the rules are ex post facto laws since nude dancing was lawful for three years prior to the adoption of the rules, and plaintiffs had established a clientele on such basis; (5) in giving the Liquor Control Commission authority to promulgate rules, the Legislature impermissibly delegated its legislative power. Two non-constitutional issues of minor importance were raised.

to regulate the manner in which liquor is sold. *Noey* v. *City of Saginaw*, 271 Mich 595; 261 NW 88 (1935). So drastic a reduction in the powers of the Liquor Control Commission requires more than inference.

The thrust of plaintiffs' claim that Rule 436.37 contravenes the first amendment guarantee of freedom of expression or the fourteenth amendment's guarantee of equal protection, is that nude dancing, when not performed in an obviously obscene or offensive manner, is protected by the first and fourteenth amendments. *Jenkins* v. *Georgia*, 418 US 153; 94 S Ct 2750, 41 L Ed 2d 642 (1974); *Erznoznik* v. *City of Jacksonville*, 422 US 205, 95 S Ct 2268; 45 L Ed 2d 125 (1975). According to plaintiffs nude dancing is a constitutionally protected form of expression, losing such protection only when shown to be obscene. *Salem Inn* v. *Frank*, 522 F2d 1045 (CCA 2, 1975); *Attwood* v. *Purcell*, 402 F Supp 231 (D.C. Ariz., 1974); *Lucifer's Gate Inc.* v. *Town of Van Buren*, 373 NYS 2d 304, 83 Misc 2d 290 (1975); *State of Oklahoma* v. *Walker*, 568 P2d 286 (1977). Plaintiffs state the rule too broadly.

The landmark decision on the question at issue here is *California* v. *La Rue*, 409 US 109; 935 S Ct 390, 34 L Ed 2d 342 (1972), *reh den* 410 US 948; 93 S Ct 1351; 35 L Ed 2d 615 (1973). In that case regulations issued by the California Department of Alcoholic Beverage Control prohibiting naked entertainment in establishments licensed to sell liquor were challenged as being in violation of the first and fourteenth amendments. In sustaining the regulations, the United States Supreme Court drew a distinction between statutes or ordinances which censor dramatic performance in the theater and regulations which only prohibit such exposure in bars and cocktail lounges where liquor is sold.

"The substance of the regulations struck down pro-

hibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, *the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.*

• • •

"The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. *Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.*" (Emphasis supplied.) 409 US 109, 34 L Ed 2d at 352.

Appellants claim that *La Rue* is not controlling since the decision refers only to a situation where the nude performances had degenerated into gross sexuality and bacchanalian revelries. We disagree. We read *La Rue* as upholding the facial constitutionality of the challenged regulations. Any doubts as to the scope of that decision were resolved when the Supreme Court denied certiorari in the interpretation given *La Rue* in *Richter* v. *Department of Alcoholic Beverage Control*, 559 Fed 2d 1168 (CCA 9, 1977), *cert den* 443 US 1046; 96 S Ct 891; 54 L Ed 2d 797 (1978). There, plaintiff who operated an establishment named the "Body Shop" admitted to allowing nude dancing on the premises but, as in the case before us, argued that *La Rue* only erased the first and fourteenth amend-

ment protections where the dancing was shown to be more a form of gross sexuality than an artistic form of expression. The Court rejected plaintiff's interpretation, saying:

> "The appellant is incorrect in his contention that it must initially be determined whether the entertainment is more 'gross sexually' than 'communicative expression'. If it is concluded, as it apparently was in *La Rue*, that the combination of nude dancing and alcoholic inebriation increases to an unacceptable level the likelihood of illegal and/or disorderly conduct, the state can properly prohibit the combination of the two. The issue, therefore, is not whether the nude dancing is so near gross sexually as to approach obscenity, but whether nude dancing of any sort when performed in establishments serving liquor is sufficiently likely to cause properly proscribed conduct. Thus, the fact that the nude dancing here may have been entirely tasteful is irrelevant, once it is accepted that the state can constitutionally prohibit the serving of liquor in establishments which provide nude dancing." 559 F2d at 1173.

Accordingly, we conclude that the regulations in question were not facially violative of constitutional protections.

Finally, we hold that the regulations are not ex post facto laws as that term is used in US Const, art 1, § 9 and Const 1963, art 1, § 10. The regulations do not purport to punish occurrences prior to the date of issue of the regulations. Further, the Liquor Control Commission had never expressly approved topless or bottomless dancing. Since the rules do not preclude or regulate facts in existence prior to November 13, 1977, the effective date of the rules, they are not ex post facto. *Grant* v. *City of Alpena*, 107 Mich 335; 65 NW 230 (1895); *People of City of East Detroit* v. *Vickery*, 69 Mich App 183; 244 NW2d 404 (1976).

Plaintiffs claim that the Legislature impermissibly delegated its legislative power when it conferred authority on the Liquor Control Commission to issue rules, was not raised below and consequently the trial court did not address the issue. Ordinarily we will not decide issues not raised below. *Oakland County* v. *City of Detroit*, 81 Mich App 308, 313; 265 NW2d 130 (1978), *Falk* v. *Civil Service Commission of Macomb County*, 57 Mich App 134, 137-38; 225 NW2d 713 (1974). Const 1963, art 4, § 40 declares the Legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof. The constitution has made the delegation directly, and the fact the Legislature has not, in its discretion, chosen to limit the scope of that delegation violates no constitutional proscription.

Affirmed, no costs, a public question being involved.

STATE OF MICHIGAN
COURT OF APPEALS

BEN BUNDO, JR. and BEN BUNDO, SR.,
Plaintiffs-Appellants,

vs. No. 78-2272

LIQUOR CONTROL COMMISSION
FOR THE STATE OF MICHIGAN,

Defendants-Appellees.

BEN BUNDO, JR. and BEN BUNDO, SR.,
Plaintiffs-Appellants,

vs. No. 78-2744

OAKLAND COUNTY PROSECUTOR,
ASSISTANT OAKLAND COUNTY PROSECUTOR,
MICHIGAN STATE POLICE and WALLED LAKE
POLICE DEPARTMENT, Jointly and Severally,

Defendants-Appellees.

BEFORE: Allen, P. J., T. M. Burns and Holbrook, JJ.

T. M. BURNS, J., Concurring.

I concur and write separately only to address a point raised by plaintiffs in oral argument. There, plaintiffs requested that their liquor license be returned to them upon their assurances that they would henceforth comply with the regulations of the Liquor Control Commission. In light of the fact that plaintiffs have made no formal motion for return of their license, it would be inappropriate for such relief at this time. However, if plaintiffs are in compliance with the Liquor Control Commission regu-

lations, I would give them back their license. Therefore, I would have this Court retain jurisdiction over this matter in order that plaintiffs could file an appropriate motion so that this panel could determine whether they are entitled to have their license restored. GCR 1963, 820.1. *Barr* v. *Pontiac City Commission*, — Mich App —; — NW2d — (Docket No. 78-381, rel'd June 26, 1979).

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of April, in the year of our Lord one thousand nine hundred and eighty-one

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Present the Honorable MARY S. COLEMAN, Chief Justice,

THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

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CoA: 44113
LC: 78-22245-SZ
SC: 65089

CR 30-4

BEN BUNDO, JR. and BEN BUNDO, SR.,
Plaintiffs-Appellants,

v.

MICHIGAN LIQUOR CONTROL COMMISSION,
Defendant-Appellee.

(April 15, 1981)

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

[JURAT OMITTED]

IN THE SUPREME COURT OF THE
STATE OF MICHIGAN

SC: 65089
CoA: 44113
LC: 78-22245-SZ

BEN BUNDO, JR. and BEN BUNDO, SR.,

Plaintiffs-Appellants,

v.

MICHIGAN LIQUOR CONTROL COMMISSION,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(June 8, 1981)

NOTICE IS HEREBY GIVEN, that Ben Bundo, Jr., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Michigan Liquor Control Commission on February 2, 1978, finding Rule 436.37 of the Michigan Administrative Code constitutionally valid and revoking Appellant's Liquor License for one violation of said Rule, as affirmed by the Circuit Court for the County of Ingham on February 20, 1979, and as affirmed by the Michigan Court of Appeals on April 9, 1980 and as affirmed by the denial of

Appellant's Application for Leave to Appeals entered by the Michigan Supreme Court on April 15, 1981.

This Appeal is taken pursuant to 28 U.S.C. § 1257 (2).

RABETTE & O'DEA, P.C.

By: /s/ THOMAS P. RABETTE

Attorneys for Appellant

1411 Woodward, Suite 200
Bloomfield Hills, MI 48013
(313) 333-7931

[CERTIFICATION OMITTED]

STATE OF MICHIGAN
IN THE COURT OF APPEALS

SC: 65089
CoA: 44113
LC: 78-22245-SZ

BEN BUNDO, JR. and BEN BUNDO, SR.,

Plaintiffs-Appellants,

vs.

MICHIGAN LIQUOR CONTROL COMMISSION,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(June 15, 1981)

NOTICE IS HEREBY GIVEN, that Ben Bundo, Jr., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Michigan Liquor Control Commission on February 2, 1978, finding Rule 436.37 of the Michigan Administrative Code constitutionally valid and revoking Appellant's Liquor License for one violation of said Rule, as affirmed by the Circuit Court for the County of Ingham on February 20, 1979, and as affirmed by the Michigan Court of Appeals on April 9, 1980 and as affirmed by the denial of Appellant's Application for Leave to Appeals entered by the Michigan Supreme Court on April 15, 1981.

This Appeal is taken pursuant to 28 U.S.C. § 1257 (2).

RABETTE & O'DEA, P.C.

By: /s/ THOMAS P. RABETTE

Attorneys for Appellant

1411 Woodward, Suite 200
Bloomfield Hills, MI 48013
(313) 333-7931

[CERTIFICATION OMITTED]